

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

74-2440

United States Court of Appeals

For the Second Circuit.

In the Matter of

ALPHONSE GUARIGLIA,

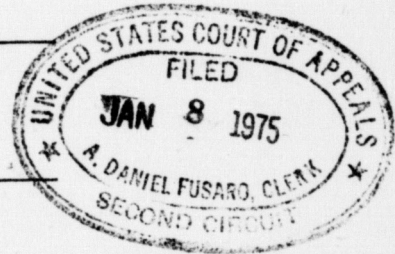
Bankrupt, Appellee,

v.

COMMUNITY NATIONAL BANK AND TRUST COMPANY,
Creditor, Appellant.

*On Appeal From The United States District
Court For The Eastern District Of New York*

CREDITOR-APPELLANT'S BRIEF



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ISSUES PRESENTED FOR REVIEW

(The numbers in parentheses refer to pages in the Appendix.)

1. May the Bankruptcy Court enjoin the enforcement of a judgment wherein a bankrupt is adjudicated to have willfully caused damage to a creditor in a sum certain?

2. May bankruptcy courts enjoin state court final judgments or merely pending proceedings? In other words, are state court judgments (as distinguished from proceedings) not entitled to full faith and credit?

3. Are fines for contempt of court dischargeable in bankruptcy?

4. Should enforcement of a state court judgment be enjoined solely on argumentative speculation as to the motives and reasons for said judgment and without any part of the record on which it was based?

Appellant submits that the above questions should be answered in the negative. The courts below in effect answered each question positively. If error was committed in deciding any one of said issues, the order below should be reversed.

STATEMENT OF THE CASE

This is an appeal from a decision and order of the United States District Court for the Eastern District of New York dated 9/30/74 (Bartels, J.) (3-11), which affirmed an order of the Bankruptcy Court (Price, J.) dated 2/27/74 permanently enjoining appellant, COMMUNITY NATIONAL BANK, from enforcing a certain fining order entered in the Civil Court of the City of New York on 6/19/73. (47,48)

Appellant, COMMUNITY NATIONAL BANK, held an unpaid judgment against respondent, ALPHONSE GUARIGLIA. On September 15, 1972 it commenced a special proceeding against him by the issuance of a subpoena. Said proceeding was terminated by an order dated June 19, 1973 (19-21), which adjudged:

"That said debtor (GUARIGLIA) is guilty of contempt of court having willfully disobeyed the subpoena dated the 15th day of September, 1972, heretofore personally served upon him, in that he failed to satisfactorily excuse or explain said contempt, and it is
Adjudged that plaintiff (COMMUNITY NATIONAL BANK) was actually damaged in the sum of \$4,755.00; that said misconduct of the Judgment Debtor was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of said Judgment Creditor. . ."

The said Civil Court imposed a fine in the amount of said willfully caused damage and gave the

debtor leave to pay the same at \$20.00 per week. No part of the record or proceedings of the Civil Court were ever produced before the Bankruptcy Court or the District Court except said fining order.

While said proceedings were pending, on February 7, 1973, the debtor filed a petition in bankruptcy. He never sought nor obtained a stay of proceedings in the state court until after the entry of said fining order. On July 5, 1973 he obtained an order to show cause which brought on the proceedings below.

ARGUMENT

POINT I

DAMAGES CAUSED BY WILLFUL WRONGS ARE NOT DISCHARGEABLE.

Section 17 (11 U.S.C. §35 (8)) provides that a liability for a willful or malicious injury to the person or property of another is not dischargeable. The judgment of the state court adjudged that the bankrupt was guilty of contempt for "having willfully disobeyed the subpoena dated the 15th day of September, 1972 . . ." and it further "Adjudged that plaintiff was actually damaged in the sum of \$4,755.00; that the said misconduct of the Judgment Debtor was calculated

to and actually did defeat, impair, impede and prejudice the rights and remedies of said Judgment Creditor."

The court below erred in treating the contempt proceedings as merely "a method of collecting a debt" (9) and the original money judgment as the only embodiment of appellant's rights. Actually, the contempt proceedings were independent proceedings, based on a new and willful wrong committed before bankruptcy, and calculated to defeat appellant's lawful rights.

POINT II

THE ORDER BELOW IS
CONTRARY TO CONTROLLING DECISIONS.

Re: Koronsky 170 Fed. 719.

Re: Metz 6 Fed. 2d, 962.

Re: Tomashofsky 51 Fed. 2d, 1040.

POINT III

THERE IS NO AUTHORITY FOR THE
ENJOINING OF STATE COURT JUDGMENTS
ENTERED AFTER THE PETITION IN BANKRUPTCY.

Apparently referring to 28 U.S.C. §2283, Judge Bartels said (4,5), "It is hardly necessary to observe that the power of the federal courts to enjoin state court proceedings is severely restricted except in the field of bankruptcy." After quoting Sec. 11a (11

U.S.C. §29a) which authorizes a stay only until adjudication of a discharge, he sought to buttress the claim to a permanent injunction by citing Sec. 2a (11 U.S.C. §11a) which invests bankruptcy courts "with such jurisdiction at law and equity as will enable them to exercise original jurisdiction in proceedings under this Act . . ." in order to justify "ancillary jurisdiction to effectuate and enforce their judgments of adjudication of bankruptcy and of discharge of bankruptcy debts". (7)

This is contrary to the basic bankruptcy rule that it is for the federal court to grant a discharge but for the state court to determine its effect.

Re: Bernard 280 Fed. 715.

POINT IV

THE FAILURE OF THE BANKRUPT TO
STAY THE STATE COURT BEFORE IT
MADE AN ADJUDICATION WAIVES
THE DISCHARGE.

Proper procedure requires that the bankrupt obtain a stay from the bankruptcy court against the state court proceeding while the bankruptcy proceedings are pending pursuant to Sec. 11 (11 U.S.C. §29) and then to interpose such discharge after he obtains it from the federal court, in the state court proceeding.

Re: Bernard, supra, failure to follow this procedure is a waiver of his discharge as to that proceeding.

Household Finance Co. v. Dunbar, 262 Fed. 2d, 112. The record herein shows that no stay against the Civil Court proceeding was ever applied for or obtained (32, lines 10-15). Consequently, the bankrupt waived his right to be discharged from paying the fine assessed on June 19, 1973 in the Civil Court.

POINT V

A STATE COURT JUDGMENT SHOULD
NOT BE SET ASIDE ON MERE SUSPICION.

The District Court judge said (9): "If the contempt . . . is in fact a method of collecting a debt upon the application of a creditor, then the so-called contempt is suspect and may in reality be nothing more than a label to assist the creditor. . . . When the fine is in the amount of the debt to be paid to a creditor by a debtor in bankruptcy, the contempt then becomes a method of according the creditor a preference by the collection of a provable debt dischargeable in bankruptcy."

Had the learned judge below been better acquainted with the New York Judiciary Law, §773, he would have known that the Civil Court is limited to

\$250.00 in fining the debtor for a nominal contempt. To impose a fine in excess of that amount there must be evidence of actual damage. In this case there was an adjudication of actual damage in the sum of \$4,755.00. Either the evidence did support such a finding or it did not support such a finding. If it did support such a finding then the creditor was damaged by the debtor's willfully contemptuous act and it would be unfair to characterize the contempt proceedings as "suspect", "circumvention" and a "method of according the creditor a preference". On the other hand, if the evidence did not support such a finding there was an adequate opportunity to review open to the debtor in Appellate Term of the New York Supreme Court. Having failed to protect himself in that manner and also having failed to stay the court proceedings before adjudication, as provided in the Bankruptcy Act, the debtor should not now be permitted to set aside a state court judgment on mere suspicion without so much as an examination of the basis on which the state court reached its conclusion. Appellant submits that the Civil Court adjudication that the creditor was "actually damaged" by the debtor's willful disobedience and calculated misconduct is entitled to sufficient faith and credit under

the federal constitution as to protect it against an attack based on mere suspicion of circumventing the Bankruptcy Act. In Local Loan v. Hunt, 292 U.S. 234, 241, the "unusual circumstances" was the fact that the Illinois Supreme Court interpreted an assignment of future wages as creating a presently secured interest which would survive bankruptcy. This interpretation could leave uprooted the Bankruptcy Act in Illinois. The situation here is quite the contrary. New York law limits a fining order to \$250.00 absent actual damage. The threat to the Bankruptcy Act by Illinois law is absent here.

CONCLUSION

THE ORDER BELOW SHOULD BE
REVERSED AND THE DEBTOR'S
MOTION SHOULD BE DENIED.

Respectfully submitted,

REUBEN E. GROSS, ESQ.
Attorney for Appellant

STATE OF NEW YORK)
: SS:
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 6 day of Dec. 1974, 1974 deponent served the within BRIEF upon Kalman Finkel Esq.

The Legal Aid Society

attorney(s) for Appellee

in this action, at 267 West 17 St
New York, N.Y. 10011

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey
ROBERT BAILEY

Sworn to before me, this
6 day of Dec. 1974

William Bailey

WILLIAM BAILEY

Notary Public, State of New York

No. 43-0132945

Qualified in Richmond County

Commission Expires March 30, 1976